Supreme Court, U.S.
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No. 94-1815

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

DOUGLAS MILLER,

Petitioner,

VS.

COUNTY OF SANTA CRUZ, SHERIFF AL NOREN, OFFICER MARILYN WEAVER, OFFICER TERRY MOORE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a plaintiff who initiates administrative adjudication of a claim, but fails to avail himself of the right to judicial review of that administrative adjudication, is precluded from filing a collateral action in federal court under 42 U.S.C. § 1983.

2. Whether the ruling of an administrative tribunal composed of nonlawyers but subject to de novo judicial review of all issues of fact and law is entitled to preclusive effect in a collateral action under 42 U.S.C. § 1983.

PARTIES

Respondents County of Santa Cruz ("County"), Sheriff Al Noren, Officer Marilyn Weaver, and Officer Terry Moore were defendants below in an action alleging violations of the civil rights of Petitioner Douglas Miller ("Miller"), plaintiff below. The action was filed in the United States District Court for the Northern District of California.

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BRIEF IN OPPOSITION

Respondents County of Santa Cruz, Sheriff Al Noren, Officer Marilyn Weaver, and Officer Terry Moore submit this brief in opposition to Douglas Miller's Petition for Writ of Certiorari.

STATEMENT OF THE CASE[1]

Petitioner Miller seeks review of the opinion and amended opinion of the United States Court of Appeals for

[1] This Statement is limited to a discussion of the facts relevant to the petition now before the Court and does not attempt a complete description of the trial proceedings below.

the Ninth Circuit affirming the trial court's disposition of Petitioner's action alleging civil rights violations under 42 U.S.C. § 1983.

A. Factual Background

Petitioner Miller was employed as a detention officer by the County of Santa Cruz between 1980 and 1987. (CD 125.)[2] In 1987, the County terminated Miller's employment because he failed to report a salary overpayment. (*Ibid.*) In light of Miller's history of disciplinary problems, the termination was appropriate. (*Ibid.*)

Miller elected to appeal his dismissal to the Santa Cruz County Civil Service Commission ("Commission"). (*Ibid.*) At a full evidentiary hearing, Miller was represented by counsel and permitted to present oral and documentary evidence and to call witnesses. (CD 125; 127, Exhibits 9 and 10.) Following a thorough consideration of Miller's claims and defenses, the Commission issued a written decision upholding the dismissal. (CD 127, Exhibit 9.) Accompanying the decision was a notice to Miller that the time within which judicial review must be sought was governed by California Code of Civil Procedure § 1094.6. (*Ibid.*)

Miller chose to forgo his right to de novo judicial review of the Commission's legal and factual determinations and instead instituted the instant federal court action for alleged civil rights violations under 42 U.S.C. § 1983. (CD 1.)

B. Procedural Background

On June 15, 1992, the County filed the motion for summary judgment arguing that established preclusion principles barred Miller's collateral action under section 1983.

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[2] "CD" refers to the Clerk's Docket sheet, incorporated into Petitioner Miller's Excerpts of Record as Item No. 17 in the appeal of this case in the Ninth Circuit.

(CD 123.) The trial court ruled that under California law Miller's claims were indeed precluded. Miller had an adequate opportunity to present and litigate his claims before the Commission and the right to seek judicial review of the Commission's adverse decision. The court held that Miller's failure to seek such review rendered the Commission's decision final and binding upon the District Court. As such, the court granted summary judgment and dismissed Miller's case. (CD 138, 137.)

Following the denial of a motion for reconsideration, Miller appealed to the Ninth Circuit Court of Appeals.

C. The Court of Appeals Decision

On appeal, the Ninth Circuit affirmed the trial court's ruling that the doctrines of res judicata and collateral estoppel bar Miller's federal suit for civil rights violations under 42 U.S.C. § 1983. (Pet. 11, 33.)[3] Looking to established California rules of preclusion, the court held that under cases like *Swartzendruber v. City of San Diego*, 3 Cal.App.4th 896 (1992), California law accords preclusive effect to issues adjudicated before administrative tribunals where a party declines to pursue appropriate judicial review. (Pet. 17, 38-39.) The Ninth Circuit found that Miller's complaint in federal court merely restated his wrongful termination claims in constitutional terms and thus improperly sought to relitigate an "issue" that had already been adjudicated. (*Ibid.*) Furthermore, the court held that the fact that the administrative decision was rendered by nonlawyers did not alter its preclusive effect. (Pet. 22, 43.) The court found it was sufficient that the Commission's adjudication met the requirements of due process and was subject to de novo judicial review. (Pet. 25, 46.)

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[3] Citations to "Pet. ____" refer to the Petition for Writ of Certiorari filed by Miller, and the accompanying exhibits.

The Ninth Circuit's opinion was originally filed on November 8, 1994, and amended on December 27, 1994. Rehearing was denied on January 5, 1995.

REASONS WHY THE PETITION SHOULD BE DENIED

The holding below is consistent with established Supreme Court decisions, including *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982), and *University of Tennessee v. Elliott*, 478 U.S. 373 (1985), and does not create a conflict among the circuits. Moreover, it promotes administrative efficiency and helps avert redundant litigation in federal court. As such, Miller's petition for writ of certiorari should be denied.

Miller initially chose to litigate his employment dispute before a state administrative tribunal. When that did not go well, he abandoned the established judicial review process and attempted to relitigate the entire matter in federal court under 42 U.S.C. § 1983. Contrary to the main contention of Miller's petition, the decision below precluding this "second bite at the apple" is entirely consistent with the principles affirmed in *Patsy*. As the Court of Appeals noted, it was *Miller's* decision to have the commission adjudicate his complaint. (Pet. 15, 37.) No exhaustion of remedies requirement was ever *imposed* upon Miller. (*Ibid.*)

As for Miller's second issue, there is no conflict between the Third and the Ninth Circuits over the preclusive effect of administrative rulings rendered by nonlawyers. Upon closer examination the discrepancy between the circuits is due primarily to the different facts and constitutional questions at issue in the cases. Indeed, where the facts of the cases coincide, there is no conflict.

A. The Decision Below Is Entirely Consistent With *Patsy*

Patsy v. Board of Regents of the State of Florida reaffirmed the longstanding doctrine that exhaustion of administrative remedies is not required as a prerequisite to bringing a 1983 action. 457 U.S. at 516. The *Patsy* doctrine is, however, inapposite to the instant case. Where, as here, the claimant elects to pursue an administrative remedy, federal courts give preclusive effort to the findings of state administrative tribunals. *Elliott*, 478 U.S. at 380.

As the Court of Appeals concluded, "[n]othing prevented Miller, *prior* to his appeal to the Civil Service Commission, from filing suit in either state or federal court under § 1983." (Pet. 15, 37.) An exhaustion requirement would have compelled Miller to pass through the state administrative procedures before seeking the federal remedy. Miller was under no such constraint. Rather, he elected "to pursue his claim initially in an administrative forum, and to forego the right to seek judicial review in a state court." *Id.* Thus, contrary to Miller's arguments, "*[n]o exhaustion requirement has been imposed on Miller.*" *Id.* (emphasis added).

The decision below was based on well established California rules of claim and issue preclusion and not on a failure to exhaust administrative remedies. This Court held in *Elliott* that "Congress, in enacting the Reconstruction civil rights statutes, did not intend to create an exception to general rules of preclusion." 478 U.S. at 796-97. Consistent with this teaching, the Ninth Circuit has held that federal courts should ordinarily observe state laws of preclusion in 1983 actions. *Plaine v. McCabe*, 797 F.2d 713, 719 n.13 (9th Cir. 1986).[4]

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[4] An exception would arise "where a state court would give preclusive effect to an administrative decision that failed to meet the minimum criteria set down in [*United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966)]." *Plaine*, 797 F.2d at 719 n.13. This is not an

California preclusion law bars all claims that were or could have been litigated in the collateral forum. *California Coastal Commission v. Superior Court (Ham)*, 210 Cal.App.3d 1488, 1499 (1988). In *Swartzendruber v. City of San Diego*, a case directly on point and relied on by the court below, the California Court of Appeal addressed the preclusive effect of failing to seek judicial review of a civil service commission ruling and instead attempting to bring a collateral 1983 action on the same issues. 3 Cal.App.4th at 903. The court held that state preclusion principles make administrative adjudications binding. *Id.* at 908-09.

Under California law, where the claim at issue involves a fundamental right, such as employment, the claimant is entitled to "de novo" judicial review. *McMillen v. Civil Service*, 6 Cal.App.4th 125, 129 (1992). Under this rule the trial court in a 1094.5 proceeding reweighs the evidence and redecides the issues. *Dickey v. Retirement Board*, 16 Cal.3d 745, 751 (1976). Following that review, the claimant has a right of "appeal" to the California Court of Appeal. This right of "de novo" review existed for Miller and for the claimant in *Swartzendruber*.

Miller, like Swartzendruber, failed to pursue such relief and instead sought to file duplicative relitigation of the same "primary right"—i.e., the "right to continued employment" —in a collateral 1983 action. *See Swartzendruber*, 3 Cal.App.4th at 908-09 (discussing California's primary rights doctrine).[5]

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issue in the present case because California has adopted the *Utah Construction* standard. *Id.*

[5] In *Plaine v. McCabe*, the court held that the fact an administrative decision is unreviewed does not diminish the preclusive effect of the decision because state court review *was in fact available* via California Code of Civil Procedure § 1094.5 but purposefully not pursued. The court held that "[i]f an adequate opportunity for review is available, a losing party cannot obstruct the preclusive use of the state administra-

Following *Swartzendruber*, the court below held that under California law the primary right of Miller's claims was (or should have been) addressed in the case *he elected* to bring before the Civil Service Commission, and therefore a collateral attack against defendants in federal court under 1983 is precluded. Exhaustion of administrative remedies was never at issue. The court's holding flows from a straightforward application of well established California preclusion—not exhaustion—doctrines. There is no conflict whatsoever with *Patsy*.

B. The Differences Between *Edmundson* and *Miller* Are Due Principally to the Different Facts and Claims at Issue

Miller attempts to construct a serious conflict between the circuits by noting that the Third Circuit in *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3rd Cir. 1993), refused to accord preclusive effect to the conclusions of lay persons on a civil service commission. Miller maintains this directly conflicts with the decision below. (Pet. 5.) Yet the apparent conflict fades when the facts and claims of the two cases are closely examined.

Edmundson involves a factually and procedurally convoluted situation, but to the extent its facts coincide with those of this case, the two decisions reach essentially the same conclusion. Much like the court below, the *Edmundson* court held that plaintiff's claim under section 1983 against the Pennsylvania Unemployment Compensation Board of Review was barred by claim preclusion because he had failed to raise it either in the administrative hearing or the subsequent judicial review. "Because plaintiff could have but did not raise the First Amendment defense . . . and did not preserve it for federal court adjudication [citation omit-

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tive decision simply by foregoing [the] right to appeal." 797 F.2d at 719 n.12.

ted], he is precluded from asserting that ground in the present case." *Id.* at 191. Thus the decision below and *Edmundson* are in agreement on the facts of this case: A complete failure to raise constitutional issues under section 1983 in administrative and subsequent judicial proceedings results in *claim preclusion.*

Miller clings to that part of *Edmundson* where the Third Circuit refused to accord preclusive effect to the failed efforts of a civil service commission to properly analyze the First Amendment implications of two disciplinary actions.[6] In each situation the commission had attempted to address the intricate legal issues implicated by the First Amendment, but had been unable to do so competently. In light of this, the court held that *issue* preclusion could not arise in a subsequent 1983 action because "an administrative agency consisting of lay persons [does not have] the expertise to issue binding pronouncements in the area of federal constitutional law." *Edmundson*, 4 F.3d at 193. Such a question is not raised in the instant case.

Edmundson does not create the conflict Miller suggests. The decision in *Miller* rests principally on *claim* preclusion grounds. Miller could have raised his 1983 claim before the Commission and then before the superior court in mandamus review but did not, and so was precluded from proceeding in federal court. On this point there is no conflict between the cases. *Edmundson* likewise found claim preclusion under similar circumstances.

What distinctions exist are due primarily to a federal constitutional law question raised in *Edmundson* which is

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[6] Edmundson was disciplined twice. The first time he was suspended; the second terminated. Both times he went before the civil service commission claiming his First Amendment rights had been violated, but each time the commission ruled against him. And both times he abandoned his appeal to a judicial tribunal.

not raised in *Miller*. The *Edmundson* court held that issue preclusion could not arise *on the First Amendment issue* because the commission was incompetent to conduct the intricate First Amendment analysis required by cases such as *Connick v. Myers*, 461 U.S. 138, 142 (1983). *Edmundson*, 4 F.3d at 192-93 ("We see a profound difference in the ability of a Commission composed of lay citizens to resolve matters of credibility and fact . . . and the ability to determine the more complex question of whether the statements are constitutionally protected" under applicable First Amendment standards.). By contrast, in the present action there has never been the suggestion that the members of the Commission were professionally or intellectually incompetent to render factual findings on whether Miller was discriminated against or denied the process generally due public employees. These questions are mostly matters of fact requiring no heightened legal analysis.

Collateral estoppel is proper in this case because the primary issues (discrimination, improper termination procedures, etc.) are well within the competence of civil service commissions. (In addition, the procedure provides for review by a judge under a de novo standard in a mandamus proceeding to correct any errors in resolving such issues.) Thus the discrepancies between the two cases are best viewed as different resolutions to different cases, hardly the magnitude of conflict meriting this Court's review.

C. A Contrary Decision Would Swamp the Federal Courts with Duplicative Public Employment Disputes

Miller's view that preclusion principles should not apply to this case would turn the federal courts into super civil service commissions. Under Miller's rationale, every claimant will always appeal an employment dispute to a civil service commission and then, if unsuccessful, file a subsequent 1983 action on the same primary right in federal court. Without proper adherence to well established preclu-

sion principles, the federal courts will be flooded with disgruntled public employees attempting to refight their employment battles under the convenient guise of 1983 civil rights claims.

By his own choice, Miller took advantage of the expedited and relatively inexpensive grievance mechanisms provided by the Civil Service Commission but then failed to avail himself of the right to judicial review. The important policies of administrative and judicial efficiency which lie at the heart of preclusion law militate against allowing Miller to litigate anew his complaints in federal court.

CONCLUSION

Miller chose to litigate his employment dispute before the Civil Service Commission of the County of Santa Cruz and lost. Now, having neglected to comply with state judicial review procedures, Miller seeks to relitigate the entire matter in federal court under the aegis of 42 U.S.C. § 1983. The district court and the court below properly denied him that chance on the ground that well established preclusion doctrines bar such duplicative litigation. Miller could have raised the 1983 issues before the Commission and the superior court in a mandamus proceeding, but did not. State preclusion law, which courts are obliged to apply in these matters, now bars him from doing so in a collateral forum.

Miller's suggestion that such elemental preclusion principles somehow violate this Court's holding in *Patsy* is without merit. Miller selected his forum; no exhaustion requirement was imposed upon him. The ruling below merely holds him to his decision.

Nor can Miller conjure a serious circuit conflict meriting this Court's attention out of de minimis differences in two legally and factually different cases. In the present case there is no question that the forums available to Miller could

have competently and conclusively resolved all his grievances. He merely chose not to use them.

Miller's petition for writ of certiorari should be denied.

Respectfully submitted,

Dated: June 1, 1995

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